

REMARKS***Status of Claims***

Claims 1-16 are currently pending in the application.

Of the pending claims, claim 16 is withdrawn.

Accordingly, Applicants hereby request further examination and reconsideration of the presently claimed application in light of the amendments and the following remarks.

Drawing Objections – 37 CFR 1.83(a)

The examiner as objected to the drawings since the buckle of claim 16 is not shown in the drawings. Applicants have withdrawn claim 16 in order to address this objection. Accordingly, Applicants respectfully request that the objection to the drawings be withdrawn.

Claim Rejections – 35 USC § 112, second paragraph

Claims 1-14 have been rejected under 35 USC § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicants regard as the invention. Apparently, the examiner continues to reject these claims on the grounds that “Applicant’s assertion that having only one support as compared to having multiple support locations would enhance the cover’s ability to withstand peak wind conditions contradicts physics laws.” But the evidence submitted by Applicants in the Taubert declaration clearly supports Applicant’s assertion.

Mr. Taubert describes side-by-side field tests of about 1,000 Porter covers (having multiple support straps) and about 1,700 of the presently claimed single support strap covers for over three years (Taubert declaration, paragraphs 6-12), and notes that these field tests demonstrate that the

presently claimed (single support strap) “covers are surprisingly superior at staying in place on the cotton module.” *See Taubert Declaration, paragraph 13*. More specifically, Mr. Taubert notes that while about 40% of the Porter covers were lost during the side-by-side field testing, none of the presently claimed covers were lost. *See Taubert Declaration, paragraph 14*. So the data in the previously presented Taubert declaration demonstrates that the presently claimed single support strap covers “perform significantly better in real-world conditions” than the Porter covers (with multiple support straps) of the cited prior art.

This evidence in the Taubert declaration cannot be ignored. In fact, MPEP 716.01 requires that “evidence traversing rejections, when timely presented, must be considered by the examiner whenever present,” and notes that this applies to “all evidence traversing rejections submitted by applicants, including affidavits or declarations.” *See also MPEP 716.01(a)* (indicating that “affidavits or declarations, when timely presented, containing evidence . . . must be considered by the examiner in determining the issue of obviousness”), *MPEP 716.01(c)* (noting that even opinion “testimony is entitled to consideration”), and the arguments below, hereby fully incorporated. The examiner has not presented any evidence contradicting the Taubert declaration, but has instead relied on a conclusory statement. Since the ultimate decision must be made on the evidence, and the only evidence on this point is the Taubert declaration which supports patentability, Applicants respectfully request that the §112 rejection be withdrawn, and that claims 1-14 be found in condition for allowance.

Claim Rejections – 35 USC § 103(a) Obviousness

Claim 8 has been rejected under 35 USC § 103(a) as being unpatentable over *Porter* (U.S. Patent No. 5,904,243) or in the alternative, under 35 USC § 103(a) as being unpatentable over

Porter in view of *Frieder et al.* (U.S. Patent No. 3,011,820). Claims 1-3, 5, 6, 9-11, 13-16 have been rejected under 35 USC § 103(a) as being unpatentable over the *Porter* rejection, and further in view of either *Ilorwath* (US Published Application No. 2003/0226846) or *Gallagher* (U.S. Patent No. 4,308,905); and claims 4, 7, and 12 have been rejected under 35 USC § 103(a) as being unpatentable over the *Porter* rejection and further in view of either *Campbell* (U.S. Patent No. 2,705,461) or *Frieder et al.* Applicants respectfully disagree with these rejections for at least the reasons set forth below:

I. The *Porter* reference cannot render the claimed invention obvious

As previously explained in detail in the response of June 13, 2008, hereby fully incorporated, the cited *Porter* reference cannot render the claims of the present application obvious. First, *Porter* specifically teaches a cover with multiple support straps (*see Porter*, Col. 12, lines 42-54 reciting multiple hanger members on each side of the cover, as shown in Figs. 16 and 19). There is nothing in *Porter* that would lead a person of skill in the art field towards the presently claimed invention (having only a single support strap on each side).

This point is further supported by the previously submitted Taubert declaration, which specifically relates the results of side-by-side field tests demonstrating that the presently claimed invention is surprisingly superior to the *Porter* cover. The 40% improvement described in paragraph 14 of the Taubert declaration is clearly both significant and surprisingly unexpected. In fact, the results were so significant that Mr. Taubert stopped using *Porter* covers and switched exclusively to the present invention (with a single strap). *See Taubert declaration, paragraphs 13, 15, and 16.* And Mr. Taubert, a representative person of skill in the art field, was surprised by the superior performance of the present invention, as described in paragraphs 1-4 and 19-20. Furthermore, the Taubert declaration provides nexus by linking the superior results of the presently

claimed invention to the single support strap (noting in paragraph 10, for example, that the *Porter* cover is essentially the same as the presently claimed invention, except that *Porter* uses multiple support straps; this can also be seen directly by comparing Figs. 16 and 19 of *Porter* to the drawings of the present invention).

The Taubert declaration provides good evidence of non-obviousness, and this evidence must be considered by the examiner (as more fully explained below and hereby incorporated). See for example MPEP 716.01 (requiring that “evidence traversing rejections, when timely presented, must be considered by the examiner whenever present,” and noting that this applies to “all evidence traversing rejections submitted by applicants, including affidavits or declarations”), *MPEP 716.01(a)* (indicating that “affidavits or declarations, when timely presented, containing evidence . . . must be considered by the examiner in determining the issue of obviousness”), and *MPEP 716.01(c)* (noting that even opinion “testimony is entitled to consideration”). So by rule, the evidence in the Taubert declaration must be considered, and this evidence further demonstrates non-obviousness.

Indeed, the examiner’s own statement with regard to the §112 rejection in the office action of August 8, 2008 (indicating that the superiority of a single support strap “contradicts physic laws”) further demonstrates that Applicants’ single-strap invention is counter-intuitive. Prior to the present invention, a person of ordinary skill in the art field simply would not be led towards the presently claimed invention. Rather, the examiner’s own reaction demonstrates that persons of skill would react with disbelief. This is the very essence of non-obviousness. So for all these reasons, the present invention clearly cannot be obvious based on the cited prior art references.

II. The cited secondary references do not lead towards the claimed invention

Furthermore, the cited secondary references for use in conjunction with *Porter* would not lead a person of ordinary skill towards the presently claimed invention, as noted previously in the response of June 13, 2008 and fully incorporated herein. The *Frieder*, *Campbell*, and *Horwath* references each deal with netting, and so they are not relevant since their open mesh could not offer any rain protection and would not experience the uplift forces at issue in the present invention. And the *Gallagher* reference is also irrelevant, since it deals with a side mounted air conditioner cover that also could not offer rain protection and would not experience wind uplift forces. Absent hindsight, these cited references would not lead a person of skill at the time of invention towards the presently claimed invention.

III. The evidence in the Taubert Declaration clearly shows that the claimed invention is not obvious, and this evidence must be considered

The real problem here seems to be a misunderstanding about whether the Taubert declaration must be given weight when considering obviousness. On page 5 of the office action of August 8, 2008, the examiner indicates that the Taubert declaration will not be given any weight, stating that “expert’s testimony can not take the place of evidence, and there is no evidence in this case showing the device with only one point of contact would perform better than the device as applied by Porter.” This is simply wrong – the examiner cannot ignore the evidence presented in the Taubert declaration, but must weigh it when considering the question of obviousness.

The PTO’s own rules quite clearly indicate that evidence cannot be disregarded, and that all evidence must be considered and weighed. For example, MPEP 716.01 requires that “evidence traversing rejections, when timely presented, must be considered by the examiner whenever

present,” while noting that this applies to “all evidence traversing rejections submitted by applicants, **including affidavits or declarations.**” Thus the Taubert declaration, with its third-party testimony regarding the results of side-by-side field tests (as described above and in the previous response of June 13, 2008, hereby fully incorporated), clearly is evidence that must be considered. *See also MPEP 716.01(a)* (stating that “affidavits or declarations, when timely presented, containing evidence . . . must be considered by the examiner in determining the issue of obviousness of claims for patentability under 35 USC 103”). In fact, even opinion evidence in a declaration must be given weight. *See MPEP 716.01(c)III* (“although factual evidence is preferable to opinion testimony, such testimony is entitled to consideration and some weight”). Thus, there is absolutely no permissible reason for the examiner to disregard the testimony in the Taubert declaration.

Further, “when an applicant timely submits evidence traversing a rejection, the examiner must reconsider the patentability of the claimed invention,” with the “ultimate determination of patentability [being] based on consideration of the entire record, by a preponderance of evidence.” *MPEP 716.01(d)*. Thus, the evidence of non-obviousness submitted by the Applicants in the Taubert declaration must be weighed against any countervailing evidence of obviousness presented by the examiner. Such a weighing of evidence in this case clearly indicates that the invention is non-obvious. After all, the only evidence comparing the effectiveness of the present invention’s single support strap to the *Porter* multi-strap cover is the Taubert Declaration, which indicates that in side-by-side field tests, the present invention showed a 40% improvement over the *Porter* cover. *See Taubert Declaration, paragraph 14*. The Declaration has not been refuted or contradicted by any countervailing evidence. Instead, the examiner seems to have relied on conclusory statements, which is improper (as noted by the U.S. Supreme Court in *KSR International Co. v. Teleflex Inc.*,

550 U.S. __ (No. 04-1350, 2007) indicating that “rejections on obviousness grounds cannot be sustained by mere conclusory statements”). **Since the previously submitted Taubert Declaration is the only evidence on this matter, an impartial weighing of evidence clearly points to non-obviousness.**

And as noted above, the Taubert declaration does explain quite clearly that side-by-side field tests demonstrated the marked superiority of the presently claimed invention (with a single support strap) when compared to the *Porter* multi-strap cover, indicating a 40% improvement. *See Taubert declaration, paragraph 14.* A 40% improvement is quite clearly significant, and this point is further supported by Mr. Taubert’s testimony as a person of skill in the art field. *See Taubert Declaration, paragraphs 15-18.* And as noted above, this improvement is also surprisingly unexpected (as noted by Mr. Taubert’s testimony in paragraph 19 of the declaration and further supported by the examiner’s own disbelief as indicated in the §112 section of the office action of August 8, 2008). And finally, the Taubert declaration clearly indicates the nexus between the surprising improvement and the presently claimed invention’s use of only a single support strap, by noting that the only significant difference between the present invention and the *Porter* cover is that the *Porter* cover uses multiple support straps, rather than the single support strap of the present invention. *See Taubert declaration, paragraphs 9-10.*

Since the evidence in the Taubert declaration must be considered, and in fact it is the only evidence related to this matter (since the examiner has not offered any contradictory evidence, but has instead relied exclusively on a conclusory statement), the presently claimed invention clearly is non-obvious. After all, the Taubert declaration explains how side-by-side field tests demonstrated the surprising superiority of the presently claimed invention (with only a single support strap) when compared directly to the cited *Porter* reference (with multiple straps). Once the Taubert

declaration is appropriately considered, the non-obviousness of the present invention simply cannot be denied.

Conclusion

The Taubert Declaration must be considered and weighed when evaluating the question of obviousness. Once this is done, the non-obviousness of the presently claimed invention can be quite clearly seen. After all, there is no evidence in opposition to the Taubert declaration, and “rejections on obviousness grounds cannot be sustained by mere conclusory statements.” *KSR International Co. v. Teleflex Inc.*, 550 U.S. ____ (No. 04-1350, 2007). So for all of the reasons set forth above, Applicants respectfully request that the §103 rejections of claims 1-15 be withdrawn, and that these claims now move immediately to allowance.

CONCLUSION

In view of the foregoing amendments and remarks, Applicants respectfully request reconsideration of the application, withdrawal of the rejections, and a finding that claims 1-15 are in condition for allowance. It is believed that each rejection raised in the *Office Action* dated August 8, 2008 has been fully addressed.

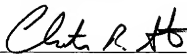
Thus, Applicants respectfully request that this application move to immediate issuance with claims 1-15 as amended. If any fee is due as a result of the filing of this paper, please appropriately charge such fee to Deposit Account Number 50-1515 of Conley Rose, P.C., Dallas, Texas. If a petition for extension of time is necessary in order for this paper to be deemed timely filed, please consider this a petition therefore.

If a telephone conference would facilitate the resolution of any issue or expedite the prosecution of the application, the Examiner is invited to contact the undersigned at the telephone number given below.

Respectfully submitted,

Date: 11/7/2008

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